

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 January 2023

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of a file relating to Her Majesty Queen Elizabeth's visit to the Isle of Man, in 1972.
2. After initially maintaining that it did not hold the requested information, the MoJ revised its position and confirmed that, at the time of the request, it did hold the file. It said that 'open' parts of the file had since been transferred to the National Archives ('TNA') and therefore, at the time of the request, that information would have been exempt from disclosure under section 22 (Information intended for future publication) of FOIA. As regards the 'closed' information, the MoJ refused to disclose this, citing sections 37(1)(a) (Communications with the Sovereign) and 41 (Information provided in confidence) of FOIA.
3. The Commissioner's decision is that, at the time of the request, the MoJ was entitled to rely on section 22 to refuse to disclose the 'open' information. The MoJ was also entitled to rely on section 37(1)(a) of FOIA to withhold the 'closed' information. However, it breached section 1(1)(a) by failing to confirm to the complainant that it held the requested information within the statutory time for compliance.
4. The Commissioner requires no steps as a result of this decision.

## Request and response

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5. Prior to making the request in this case, the complainant made the same request to the Home Office. The Home Office responded that the file had been transferred to the MoJ, and that he should instead submit his request there.

6. On 29 July 2021, the complainant wrote to the MoJ and requested information in the following terms:

“The Home Office has directed me to you as I am trying to obtain under FOI HO 284/212 (former reference CIM 67 556/2/5) which is being temporarily retained”.

7. The MoJ initially responded on 20 August 2021, saying that it did not hold the file, due to it having been lost during an external review. It maintained this position at internal review.

8. During the Commissioner’s investigation, the MoJ revised its position and confirmed that further searches had revealed that, at the time of the request, it did hold the information. However, it said it was exempt from disclosure under sections 21 (Information accessible to the applicant by other means), 37(1)(a) and 41 of FOIA.

9. Confirming this revised position to the complainant, the MoJ stated:

“The majority of the information within the scope of your request was transferred to The National Archives (TNA) on 21 October 2022, as an open file (HO 284/212), which is our standard protocol. This information is exempt from disclosure under s21 of the FOIA, because it is reasonably accessible to you, via the TNA website”.

10. As regards the ‘closed’ portions of the file, the MoJ said section 37 was engaged because the information related to communications with the Sovereign and the Sovereign’s representatives; it said that section 41 was engaged because the information was obtained from another person, and disclosure would constitute an actionable breach of confidence.

11. The MoJ revised its position a further time, explaining to the Commissioner that, at the time of the request, the transferred information was exempt from disclosure under section 22 rather than section 21. It clarified that any requests for it after the date of transfer would be refused under section 21, with the applicant being advised to access it via TNA.

## **Reasons for decision**

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12. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption either before the Commissioner or the First-tier Tribunal and both must consider any such new claims.

### **Section 1 – General right of access**

13. Section 1(1)(a) of FOIA states that an individual who asks for information is entitled to be informed whether the information they have requested is held.
14. The MoJ incorrectly told the complainant that it did not hold the requested information, when later searches confirmed that it did.
15. The MoJ has explained to the Commissioner its reasons for initially believing that it did not hold the requested information, which, due to confidentiality, will not be reproduced here. However, they concern a change in functional responsibility in 2001, and again, in 2007, as a result of which certain information held by the Home Office was due to be transferred to other departments. At the time of the request, the MoJ was unable to establish whether the file in question had ever been transferred to it from the Home Office and it incorrectly concluded that it was 'lost'.
16. During the Commissioner's investigation, the MoJ conducted further searches and it was able to locate the file.
17. The MoJ has explained to the Commissioner the steps it has taken to address the issues identified in this case, with a focus on improving records management practices and procedures.
18. Whilst the Commissioner is satisfied that, at the time of the request, the MoJ genuinely believed that it did not hold the requested information, he has made a record of this incident, for monitoring purposes.

### **Section 22 - Information intended for future publication**

19. Section 22(1) of FOIA states that information is exempt information if:
  - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not);
  - (b) the information was already held with a view to such publication at the time when the request for information was made; and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in (a).

20. Section 22 is a qualified exemption, which means it is subject to the public interest test.

21. The MoJ stated that section 22 applied to the 'open' part of the file, as there was an intention to publish it, via transfer to TNA.

22. The MoJ referred the Commissioner to his guidance on this point:

"Where a public authority has identified records for transfer to The National Archives (TNA) as 'open' records, we would accept that there is an intention to publish. This is because, once transferred to TNA, the information is made available to the public by an established and accessible system of inspection."<sup>1</sup>

23. MoJ said that the information had been selected for permanent preservation. It explained that selecting records for transfer to TNA is part of its standard records management practice, in compliance with the obligations created by the Public Records Act 1958.

24. The Commissioner notes that the information in question was transferred to TNA, as an open record, on 21 October 2022. Therefore, for the purposes of section 22, it has been 'published', and the complainant may apply to TNA for access to it, if he has not already done so. The Commissioner therefore considers that, at the time of the request, the MoJ was entitled to apply section 22 to withhold the information and that the public interest favoured non-disclosure.

### **Section 37 – Communications with His Majesty etc and honours**

25. The exemption at section 37(1)(a) FOIA (as amended by the Constitutional Reform and Governance Act 2010) states that:

"Information is exempt information if it relates to communications with the Sovereign."

26. The Commissioner's guidance states that the term 'relates to' should be interpreted broadly. In practice this means that the scope of the exemption will cover more than just the actual communications themselves; it will also apply to information that refers to, or is derived

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<sup>1</sup> Paragraph 19 <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

from, those communications. The exemption also covers communications made or received by a person (or organisation) who was acting on behalf of the Sovereign.

27. Section 37(1)(a) is an absolute exemption. This means that where the exemption is engaged there is no public interest test to be considered. The withheld information simply has to fit the exemption.
28. The Commissioner has viewed the information that has been withheld from disclosure under section 37(1)(a) and he is satisfied that it consists entirely of information relating to communications with Her Majesty Queen Elizabeth and persons acting on her behalf.
29. The Commissioner is therefore satisfied that the MoJ was entitled to withhold the information on the basis of the exemption at section 37(1)(a) of FOIA.
30. In view of this decision, it has not been necessary to consider the MoJ's application of section 41 to the same information.

## Right of appeal

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31. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**